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CHARLES ELMORE

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1929.

No. 60.

The Railroad Commission of the State of California, and the City of Los Angeles,

Appellants.

vs.

Los Angeles Railway Corporation, a corporation,

Appellee.

APPELLEE'S REPLY TO PETITION FOR REHEARING.

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Los Angeles, California, December 20th, 1929.

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Although Rule 33 makes no provision for a reply to a petition for rehearing we are advised by the clerk that the practice permits the acceptance and distribution of such a reply provided it is filed prior to or at the time of the filing of the petition. Accordingly appellee submits briefly the following observations in reply to appellants' petition for rehearing and in opposition to the granting of same:

I.

The majority opinion has considered every pertinent provision of the State's constitution, its codes, its statutes, and the City's charters, and from that consideration has held that there has never been a grant of power to the

City to contract as to rates. This holding, we submit, is not only fully supported by, but is in entire conformity with, the principles enunciated in this court's decisions in *Home Telephone Co. v. Los Angeles,* 211 U. S. 265; *Southern Iowa Electric Co. v. Chariton,* 255 U. S. 539, and *San Antonio v. San Antonio Public Service Co.,* 255 U. S. 547.

The petitioners argue, however, that the City never had power to regulate rates and upon this premise seek to draw the tenuous conclusion that the City must necessarily have had the power to contract as to rates. It is submitted that the very basis of this argument does not exist. That the City possessed full power to regulate rates at all times up to November 3, 1914, is conclusively shown, we submit, on pages 27 to 31, appellee's brief, where it appears that the State Supreme Court has repeatedly held that section 11, article XI of the State Constitution makes a direct grant of the entire police power of the State to municipalities. The Supreme Court of California has also held that the grant of police power to municipalities contained in section 11, article XI of the Constitution is not limited or restricted because elsewhere in the laws of the State there may appear other specific grants of power. Thus in the case of *In re Montgomery* (1912), 163 Cal. 457, 459-60, the charter of Los Angeles gave the city power "to license, regulate, restrain, suppress or prohibit * * *" certain enumerated businesses. The city passed an ordinance to regulate another business not enumerated. The Supreme Court upheld the ordinance, saying:

> "Petitioner's most important contention is that the enumeration in the charter of Los Angeles of certain trades, callings, and occupations which may be pro-

hibited excludes the prohibition by ordinance of others not so enumerated. * * *

"This, petitioner contends, is a limitation upon the general police power conferred by section 11 of article XI of the Constitution and by a similar section of the charter * * *.

"By specifying certain occupations that may be prohibited, petitioner maintains, the charter withholds from the city council the power to prohibit any others for, he says, the legislative body of a city having a freeholders' charter may be limited in the exercise of police power by a charter provision. * * *

"In the Pfahler case * * * 'It was held that nothing contained in the charter could affect the grant made by the Constitution, and that the city, under such constitutional grant, had the right to exercise the whole police power of the state so far as local regulations were concerned, subject only to the control of general laws.' * * *

"If, therefore, the ordinance here considered may be upheld under the general police powers of the city as exercised by its legislative body, it will not fall merely because the city has specific authority under its charter to suppress certain kinds of business."

In re Montgomery, 163 Cal. 457, 459-60.

II.

In California the grant of a franchise is a legislative function and where, as here, no grant of power to fix rates by contract exists, franchise fare provisions cannot operate by way of condition (*City of Arcata v. Green*, 156 Cal. 759, 762-4; p. 44, appellee's brief); by way of estoppel (*Town of St. Helena v. Ewer*, 26 Cal. App. 191,

195-6-7; pp. 46-7, appellee's brief); or as part consideration for the grant (*Thompson v. Board of Supervisors,* 111 Cal. 553, 557-8; p. 50, appellee's brief).

In *San Antonio v. San Antonio Public Service Co.,* 255 U. S. 547, 556, the city argued that "although no contract was possible under the constitutional restriction which would bind the city not to lower the rate, nevertheless there was a unilateral contract or condition resulting from the granting of the franchise which bound the railway company to the franchise rate * * *."

The Court dismissed this contention on two grounds, stating:

> "There is not the slightest suggestion of any attempt on the part of the parties consciously to produce such a condition. But besides, the error underlying the proposition is not far to seek. The duty of an owner of private property used for the public service to charge only a reasonable rate, and thus respect the authority of government to regulate in the public interest, and of government to regulate by fixing such a reasonable rate as will safeguard the rights of private ownership, are interdependent and reciprocal. Where, however, the right to contract exists and the parties, the public, on the one hand, and the private owner, on the other, do so contract, the law of the contract governs both the duty of the private owner and the governmental power to regulate. Were, therefore, as in the case supposed in the argument, the regulating power of government wholly uncontrolled by contract, it would follow that that power would be required to be exerted, and hence the supposed condition operating upon the private owner would be nugatory. Such a case really presents no question of a condition, since it resolves

itself into a mere issue of the exercise by government of its regulatory power."

San Antonio v. San Antonio Public Service Co., 255 U. S. 547, 556.

And in *Southern Iowa Electric Co. v. Chariton*, 255 U. S. 539, 546, the Court said:

"The total want of power of the municipalities here in question to contract for rates, which is thus established, and the state public policy upon which the prohibition against the existence of such authority rests, absolutely exclude the existence of the right to enforce, as the result of the obligation of a contract, the concededly confiscatory rates which are involved, and therefore conclusively demonstrate the error committed below in enforcing such rates upon the theory of the existence of contract. And, indeed, the necessity for this conclusion becomes doubly manifest when it is borne in mind that the right here asserted to contract in derogation of the state law and of the rule of public policy announced by the court of last resort of the state is urged by municipal corporations whose every power depends upon the state law."

Southern Iowa Electric Co. v. Chariton, 255 U. S. 539, 546.

III.

Section 32a of the Public Utilities Act (pp. 64, 67-8, appellee's brief) charges the Commission with the duty, after hearing, of fixing and determining just, reasonable and sufficient rates, whether the existing rates were fixed by contract or otherwise. And section 27 of the Public Utilities Act (footnote 3, majority opinion) gives appel-

lee the right to charge more than five cents upon its showing before the Commission that a higher charge is justified. Appellee has made such a showing before the Commission and it is conceded that the franchise fares are insufficient. In this situation the court quite properly, we submit, applied the principle which the majority opinion quotes from *Denney v. Pacific Tel. & Tel. Co.*, 276 U. S. 97. (See also, pp. 56 to 70, inc., appellee's brief.)

Moreover, granting that if the franchise fare provisions were contracts, appellee's right to relief therefrom, when confiscatory, would be statutory, nevertheless the Commission's arbitrary denial of such relief, after proper showing, results in a denial of the due process and equal protection guarantees of the federal Constitution. As said in *Interstate Commerce Comm. v. Louis. & Nash. R. R. Co.*, 227 U. S. 88, 91:

> "But the statute here gave the right to a full hearing, and that conferred the privilege of introducing testimony, and at the same time imposed the duty of deciding in accordance with the facts proved. A finding without evidence is arbitrary and baseless. And if the government's contention is correct, it would mean that the Commission had a power possessed by no other officer, administrative body, or tribunal under our government. It would mean that, where rights depended upon facts, the Commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority, however beneficiently exercised in one case, can be injuriously exerted in another, is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power."
>
> *Interstate Commerce Comm. v. Louis & Nash. R. R. Co.*, 227 U. S. 88, 91.

Conclusion.

The petition for rehearing presents no point or argument which was not before the court on the original submission. This is strikingly emphasized by the fact that the petition consists in the main of a reiteration of the views expressed in the dissenting opinions. The purport of these dissenting opinions is briefly that the cause should be remanded to the District Court for an interpretation of the various statutory and constitutional provisions involved and a determination anew of whether appellee, under its franchises, is bound by contract to maintain a five cent fare. We respectfully but earnestly submit that these issues have been thoroughly considered and fully determined in the majority opinion; that nothing constructive would be gained by a rehearing or by remanding, and that the petition therefor should be denied.

Respectfully submitted,

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Los Angeles, California, December 20th, 1929.